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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-92

(PREVIOUSLY OCTOBER TERM, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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PRELIMINARY STATEMENT

This reply brief deals under the first two heads with the two main contentions made by plaintiffs in their brief (Brief of Respondents). Under a separate third head defendants point out the essential need for antitrust immunity in an area, as in the present case, where the intervention of competitive interests is encouraged by statute and regulated by administrative rules and procedure to serve a valid governmental purpose.

I. THE PROTECTION OF NOERR-PENNINGTON APPLIES EVEN WHEN THE JOINT EFFORT TO INFLUENCE GOVERNMENTAL ACTION RESPECTING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY IS ACCOMPANIED, IN ADDITION TO ANTI-COMPETITIVE PURPOSE, BY A PURPOSE TO DETER WOULD-BE APPLICANTS FROM PROCEEDING WITH THEIR APPLICATIONS.

Plaintiffs argue that *Noerr-Pennington*[1] immunity does not apply when the joint effort to influence governmental action respecting certification is accompanied, in addition to anticompetitive purpose, by a purpose to deter would-be applicants from going forward with their applications.

This contention flies directly in the face of *Noerr-Pennington* which holds that when the efforts to influence governmental officials are genuine, intent or purpose is immaterial. As Mr. Justice White said in *Pennington* (381 U.S. at 670):

> "Noerr shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose.*" (Emphasis added.)

This holding makes no exceptions. Its strength and force are unequivocal. It applies even when the purpose and intent is "to hurt the truckers [competition] in every way possible", and even when such purpose is successful, and actual economic injury results. The intent in *Noerr* was (365 U.S. 142):

> ". . . *'to hurt the truckers in every way possible even though they secured no legislation'.* (Emphasis in original.) Specifically the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers among the public generally and among

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[1] *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

> the truckers' customers particularly . . . and that the railroads were successful in these efforts to the extent that such injury was actually inflicted".

To circumvent the unequivocal holding of *Noerr-Pennington* that intent is immaterial when the efforts to influence governmental officials are genuine, plaintiffs declare that such efforts cannot be genuine when the "real" purpose is to deter would-be applicants from going forward. They say that in such case the joint effort to influence governmental bodies is "sham" and falls within the "sham" dictum of *Noerr* (365 U.S. at 144). Such reasoning is circuitous and assigns to "sham" a meaning altogether different from that expressly stated in *Noerr*.

The "sham" dictum in *Noerr* (365 U.S. at 144) reads as follows:

> "There may be situations in which a *publicity campaign, ostensibly directed toward influencing governmental action,* is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denied that the railroads were making *a genuine effort to influence legislation and law enforcement practices.*" (Emphasis added.)

In effect the Court said, given a genuine intent to influence governmental action—genuine in the sense that a genuine effort is made to persuade governmental officials to take certain action which they are authorized to take—there is no sham regardless of whatever other intents or purposes may be present.

Awareness by would-be applicants that in any certificate proceeding the governmental body will have before it not only applicant's presentation but that of protestants, inevitably has a deterrent effect on such applicants. They will think twice before marching blithely in and expecting a certificate as a matter of course. Plaintiffs say that whenever defendants intend such deterrent result their joint efforts to influence governmental action are not "genuine" and constitute a "blocking" and are a "sham", and that antitrust laws make such joint efforts unlawful.

The circuity of such reasoning was recognized in *Noerr* and rejected. Just as in the present case defendants would know that their joint efforts would have a deterring effect, so in the *Noerr* case the railroads knew their activities to influence governmental action would inflict injury on the truckers. In *Noerr* the Court said that such knowing and intended infliction of injury *must not* be allowed to stand in the way of joint appeals to governmental agencies, so long as the effort to influence governmental action is genuine in the sense that a genuine effort is made to persuade governmental officials to take certain action. Thus we read at 365 U.S. at 144:

> "To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns".

The present case is even stronger than *Noerr* for the proposition that intent should be immaterial, once it is admitted as in the present case that the efforts to influence governmental action were genuine in the sense that defendants made a genuine effort to persuade governmental officials to refuse further certification. There is no such

thing as a legal right to receive a certificate without benefit of hearing and without intervention of protestants. On the contrary, the Interstate Commerce Act and the California Public Utilities Code, as well as the rules promulgated by the respective commissions, encourage existing carriers to come in and protest. The resulting deterring effect is part of the legal process. The knowing and intended destruction of goodwill in *Noerr* did constitute the infliction of injury; the knowing and intended deterring effect arising from the publicizing and implementing of a program by a group of existing carriers to accept the statutory invitation to make their views known is not the infliction of injury but the imposition of the burdens which go with the certificating process.

Throughout consideration of the issues in the present case it must be remembered that there is no allegation that the presentations of defendants were dishonest; there is no allegation that false information was furnished; there is no allegation that the information was irrelevant; and there is no allegation that the administrative agencies were rendered powerless to restrict the presentations of defendants in any way deemed necessary.

The plaintiffs argue that an antitrust conspiracy is beyond the competency and expertise of the ICC and PUC. Whether this is true or not is immaterial. The material point is that the effort to influence governmental action was genuine in the sense of seeking to influence governmental action effectively, and that the agencies were not prevented from exercising their processes and from making independent decisions on the merits. Plaintiffs have admitted in their briefing that the opposition to plaintiffs'

applications was as effective as defendants could make it. Brief for Respondents, pp. 6, 7. Moreover, the complaint makes no allegation that the governmental bodies were prevented from exercising full control over their procedures and their independent determination of the merits.

Plaintiffs argue that the complaint raises a factual issue as to intent which needs to be resolved. This is simply not so. Since plaintiffs have conceded that the effort to influence governmental bodies was genuine in the sense that a genuine effort was made to persuade governmental officials to take certain actions, the issue of intent relating to sham is resolved, and *Noerr-Pennington* holds that in such case there is no other issue of intent which is relevant.

II. THE NOERR-PENNINGTON IMMUNITY DOES NOT DEPEND UPON WHETHER THE GOVERNMENTAL ACTION BE "ADJUDICATION" BUT RATHER UPON BROADER CONSIDERATIONS, INCLUDING THE NEED OF GOVERNMENT TO BE INFORMED.

In their striving to find a way out of the *Noerr-Pennington* immunity plaintiffs have spun a concept that *Noerr-Pennington* does not immunize joint efforts to influence governmental officials involved in "adjudication", and that governmental action respecting certification is "adjudication".

Plaintiffs use the term "adjudication" in two ways. They say that if the trappings of court procedure are present, the work of the governmental body is "adjudi-

catory". A good deal of effort has been spent by them to point out that the ICC and PUC use the procedural techniques of courts. They next assert that the work of the ICC and PUC in acting upon applications or transfers of certificates is "adjudicatory" in a substantive sense.

There is no practical justification for drawing a line between "adjudication" and "non-adjudication" for purposes of determining whether the *Noerr-Pennington* immunity applies. If one looks instead to the reasoning of the Court in *Noerr,* one finds that the issue is whether the area in which joint efforts to influence governmental officials is involved requires the free flow of information from competitors to enable those officials to carry out their task effectively. In the area of certification there is congressional and legislative recognition that it is desirable to encourage existing certificated carriers to offer evidence in opposition to the issuance of new certificates, and the respective agencies have promulgated rules which effectively control such activity.

Plaintiffs place great reliance upon certain cases involving antitrust liability for misuses of patent rights.[2] The Ninth Circuit felt those cases, together with *Slick Airways, Inc. v. American Airlines, Inc.,* 107 F.Supp. 199 (D.C. N.J. 1951) *appeal dismissed* 204 F.2d 230 (3d. Cir. 1953), "demonstrate that litigation can be an integral part of a

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[2] *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172 (1965); *United States v. Singer Manufacturing Co.,* 374 U.S. 174 (1963); *Clapper v. Original Tractor Cab Co.,* 270 F.2d 616 (7th Cir. 1959), *cert. denied,* 361 U.S. 967 (1960); *Kobe, Inc. v. Dempsey Pump Co.,* 198 F.2d 416 (10th Cir.) (1952) *cert. denied,* 344 U.S. 837 (1952); *Lynch v. Magnavox Co.,* 94 F.2d 883 (9th Cir. 1938); *United States v. Krasnov,* 143 F.Supp. 184 (E.D. Pa. 1956), affirmed, 355 U.S. 5 (1957).

scheme prohibited by the Sherman Act." Jt.App. p. 53. The teaching of these cases should not be allowed to impair the intended sweep of the *Noerr-Pennington* immunity. If there is conflict between the patent cases and the *Noerr-Pennington* doctrine, it should be resolved in a manner different from that chosen by the Ninth Circuit majority; if the rule developed and simplistically applied below by such majority is upheld, the result will be a far-reaching adverse effect on the proper operation of administrative agencies, availability of the courts to vindicate private and public rights, and the First Amendment right to petition. Defendants will hereinbelow demonstrate that the patent cases do not require such a result.

A. The patent cases relied on by plaintiffs must be put in context.

The patent laws of the United States constitute a legislative exception to the more general public policy against monopolies in that they provide for grant to private parties of a "statutory monopoly". *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). The exception thus created, however, is strictly limited to avoid frustration both of the policy behind the patent laws themselves[3] and the more general prohibition of unreasonable restraint on trade. See *Mercoid Corp. v. Mid-Continent Invest. Co.*, 320 U.S. 661 (1944) at 664-666; *Sears, Roebuck & Co. v. Stiffel Co., supra,* 229-231; Report of the Attorney General's Na-

[3]Patents are meant to encourage invention, by rewarding those investing time and capital in their development, and to encourage early disclosure and availability of the inventions. Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 224-225.

tional Committee to Study the Antitrust Laws (1955) 225.

The federal courts have frequently been called upon to define the limits of the patent monopoly, especially in the light of the antitrust laws, and examination of the resulting body of law makes evident that patents lend themselves to a variety of abusive practices illegal under the latter statutes. Thus, exercise of purported but actually illusory rights under a patent obtained by knowing fraud on the Patent Office;[4] acquisition of numerous patents by purchase from others with a purpose of acquiring monopoly power;[5] acquisition of patent rights by "grant back";[6] deliberate non-exercise of a patent's teaching pursuant to horizontal agreement[7] or with purpose to monopolize;[8] extension of the patent's monopoly by licensing practices such as requiring royalties on sale of similar but unpatented products[9] or on ancillary "tied" products,[10] imposition of restraints on resale of patented products[11] imposition of restraints in use or sale outside the ter-

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[4]*Walker Process, Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

[5]E.g., *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

[6]E.g., *United States v. General Electric Co.*, 82 F.Supp. 753, 815-816 (D.N.J. 1949).

[7]E.g., *Hartford Empire Co. v. United States*, 323 U.S. 386, 431 (1945).

[8]E.g., *United States v. Aluminum Co. of America*, 91 F.Supp. 333, 386 (S.D.N.Y. 1950).

[9]*United States v. United States Gypsum Co., supra* at 384-385.

[10]E.g., *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *International Salt Co., Inc. v. United States*, 332 U.S. 392, 396 (1947).

[11]See *United States v. General Electric Co.*, 272 U.S. 476 (1926), at 489 (fixing resale price is illegal); *Adams v. Burke*, 17 Wall. 453 (U.S. 1873) (territorial restraints on resale are illegal).

ritorial extent of a patent,[12] restraint of a licensee's power to make and sell competitive products,[13] "package" licensing where license of one or more patents is "tied" to acceptance of license under others;[14] use of multiple patent licenses to effect a horizontal scheme of price-fixing;[15] and cross-licensing and "interchange" or "pooling" with a purpose to monopolize or unreasonably restrain competition[16] all have been held, either for themselves or as part of a wider pattern of anticompetitive conduct, violative of the antitrust laws.

The cases arising in the patent area relied on by plaintiffs and the Court of Appeals majority cannot be viewed in isolation; they are an integral part of this large corpus of precedent and are understandable only in its context; indeed, *they all are explained and justified under one or another of the rubrics of illegal abuse of patent rights above listed.*

B. The patent cases do not establish an antitrust cause of action based on litigation as such even if brought with intent to restrain competition.

When a patentee brings suit against another based on unauthorized use of the teaching of his patent by the one sued, he is utilizing his lawful, and his chief, means of protecting the property right represented by his patent.

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[12] *United States v. National Lead Co.*, 332 U.S. 319 (1947).

[13] *McCullough v. Kammerer Corp.*, 166 F.2d 759 (9th Cir. 1948).

[14] E.g., *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940).

[15] E.g., *United States v. Line Material Co.*, 333 U.S. 287, 293 (1948).

[16] *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. General Instrument Corp.*, 115 F.Supp. 582 (D.C.N.J. 1953).

Infringement suits are the usual means of enforcing patent rights. See Report of Attorney General's National Committee to Study the Antitrust Laws, *supra,* at 247. As the District Court in this case recognized, "the mere bringing of a patent infringement suit, even if alleged to have been brought maliciously and with a purpose of monopolizing an industry, does not state a violation of Section 2 of the Sherman Act" (Jt.App. p. 42), citing *International Visable Systems v. Remington Rand,* 65 F.2d 540 (6th Cir. 1933) at 542. It is obvious, moreover, that the motive of such suits will *always* be the private and commercial one of maintenance or restoration of competitive advantage. Without an underlying abuse of the patent right itself, however, resort to infringement litigation even if carried on as a conscious policy of vigorous and frequent suits, is not a patent misuse or an antitrust law violation. *Cole v. Hughes Tool Co.,* 215 F.2d 924, 935 (10th Cir. 1954) *cert. den.* 348 U.S. 927, *reh. den.* 348 U.S. 965 (1955); *Dollac Corp. v. Margon Corp.,* 164 F.Supp. 41 (D.C. N.J. 1958) *aff'd on other grnds.,* 275 F.2d 202 (3d Cir. 1960); see also *United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295 (D. Mass. 1953) at 333, *aff'd per curiam* 347 U.S. 521 (1954).

The patent cases cited by plaintiffs all involved other factors, of themselves illegal, where the infringement litigation served as an effectuating tool or evidence of the underlying wrong.

Thus, in *United States v. Singer Manufacturing Co.,* 374 U.S. 174 (1963), this Court held illegal a horizontal combination of three corporations (a) to withdraw oppositions to one another's application before the Patent

Office, (b) to cross-license, and (c) to assign patents to the member of the conspiracy who could most effectively sue other competitors of the conspirators. The wrong claimed by the plaintiff and found by the Court was "the concerted action to restrain trade" by protecting all three conspirators against Japanese competitors through exchange of patent rights and related behavior. 374 U.S. at 189, 194-195.

Kobe v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952) involved purposeful acquisition of a monopoly position by purchase and pooling of patents, as well as extensive direct communications by the patentee to the alleged infringer's customers, as did *Lynch v. Magnavox*, 94 F.2d 883 (9th Cir. 1938).

In *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965), the patent on which the infringement action was brought had been obtained by a knowing fraud on the Patent Office. The antitrust abuses there involved included the original fraud in procurement of the patent, enjoyment thereafter by the erstwhile patentee of an apparently lawful but ill-gotten and actually unlawful monopoly, and use of patent infringement warnings to customers as well as the infringement action.

Other cases relied on by plaintiffs also involved antitrust violations distinct from mere institution of infringement suits.[17]

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[17] *United States v. Krasnov*, 143 F.Supp. 184 (E.D. Pa. 1956) (exclusive patent pool); *United States v. Hartford Empire Co.*, 46 F.Supp. 541 (N.D. Ohio 1942) *aff'd* 323 U.S. 386 (1944) (exclusive pooling and purposeful acquisition of a monopoly patent position); *Stewart-Warner Corp. v. Staley*, 42 F.Supp. 140 (W.D.

The sum of the wrongs complained of in plaintiffs' First Amended Complaint is that defendants combined to adopt, make known and carry out a plan of protesting all applications before the PUC and ICC for new trucking certificates, or for transfer of certificates, or registration of intrastate applications with the ICC and sought rehearing or appealed decisions adverse to their protests by the agencies, all for the purpose of reducing or eliminating competition, and *no more*. No allegation of irregular or improper procedure, misrepresentation or the like is made. No allegation is made of other anticompetitive activity, or of agreement by defendants not to oppose

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Pa. 1941) (purposeful acquisition of numerous patents with monopolistic motive, public assertions of scope of patent rights beyond those really held, secret agreements with defendants in infringement suits to allow them to go to judgment for patentee and subsequent publication of such cases as precedent); *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616 (7th Cir. 1959) (patentees were parties to concededly illegal cross-licensing agreement). Many of the cases explicitly note that bringing of litigation, *without more*, would not be unlawful. *Kobe, supra; Stewart-Warner Corp., supra.*

In addition to cases cited by plaintiffs, infringement litigation has been involved in numerous other cases where patentees have been found to have violated the antitrust laws. E.g., *Mercoid Corp. v. Mid-Continent Invest. Co., supra.* Some cases find patentees liable where the infringement suits they have brought are really sham. E.g., *International Industries and Developments v. Farback Chemical Co.*, 145 F.Supp. 34 (S.D. Ohio 1956), Cf., *Maytag Co. v. Meadows Mfg. Co.*, 35 F.2d 403 (7th Cir. 1929) (suit brought on "passing off" theory was a sham whose real purpose was to create bad publicity and hurt competitor's business; such publicity deliberately misrepresented that patent infringement existed). *Lynch v. Magnavox, supra,* also involved bringing "sham" infringement suits. Even under *Noerr* "sham" resort to government is illegal where the only purpose is the imposition of harm by the ancillary side effects of such action and this lack of bona fide purpose is objectively demonstrable in that there is no real effort to influence government, or possibility of obtaining the government action sought.

each other's applications to the agencies.[18] There is no allegation that the agencies were precluded from exercising their jurisdictions or functions, that all plaintiffs' applications were meritorious or all defendants' protests unmeritorious. The First Amended Complaint presents the narrow issue whether combination on a continuing basis, not secret but made known to the trade, to intervene in all trucking certificate proceedings of the PUC and ICC, *without more,* violates the antitrust laws. *None* of the cases relied on by plaintiffs holding patent abuses involving litigation illegal presents a remotely similar factual situation to that here alleged.

It is true, as plaintiffs point out in their Brief at pp. 63-64, that this Court held in *Pennington* that:

> "Joint efforts to influence public officials . . . (are) not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

It is possible to argue from this, as plaintiffs indeed do argue, that the *Noerr-Pennington* doctrine cannot apply to patent litigation, because otherwise the *Singer, Kobe* and similar holdings would be nullified. But plaintiffs

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[18]Plaintiffs now seek to allege, for the first time, that defendants agreed to forebear seeking new authority themselves. Respondents' Brief, footnote 9, pp. 45-46. Yet, as Judge Sweigert recognized in his opinion below, the complaint "does not charge acts in restraint of trade or attempts at monopoly *except* in the one respect that defendants associated for the purpose of intervening in regulatory proceedings to oppose *plaintiff's* applications". Jt.App., p. 25 (emphasis added). And plaintiffs' failure to move for leave further to amend their complaint below must be taken as accepting the learned District Judge's characterization of their allegations in this respect. Moreover plaintiffs could not truthfully make an allegation of forbearance. See Brief for Petitioners, p. 14, footnote 4.

are forced to carry their argument a step further: they argue that the patent cases show *Noerr* and *Pennington* do not apply to *any* litigation, and not only to any litigation, but to any "adjudicative" proceeding.

None of the patent cases relied on by plaintiffs, however, consider at all the question of *Noerr,* and conversely neither *Noerr* nor *Pennington* considers the patent cases. *Singer* was decided after *Noerr* but before *Pennington.* Defendants submit that, in the appropriate case, this Court may wish to clarify the relationship of the rule in *Singer* with that in *Pennington.*[19] The instant case, however, does not require so much. It involves neither patents, nor any broader scheme beyond the agreement to protest. It does not even involve litigation, except in the form of appeals from regulatory decisions.

Plaintiffs on Brief herein place particularly great weight on *Walker Process,* the only case in the patent litigation area decided after *Pennington.* Yet analysis of this decision makes particularly evident how inappropriate antitrust rules developed in the patent area would be if applied in the context of trucking certification proceedings before the PUC or ICC. It is untrue to state, as plaintiffs do, that *Walker Process* involved *only* misuse of process

[19] A distinction between the two rules need not be based, indeed *should* not be based, on whether an adjudicative process is involved. Defendants suggest that the distinction might be drawn based on whether the appeal to government was an integral and necessary part of the broader illegal scheme, as it will always be in the *patent* area, or whether it was potentially independent activity of conspirators *also* engaged in other, illegal activities, as would appear to have been the case in *Pennington.* Naturally where the *only* goal of the appeal is harassment, without reasonable hope of obtaining governmental action, the *sham* exception to *Noerr* is always available.

by bringing of litigation without probable cause, although the latter element is clearly very important. Note that the *single* antitrust defendant in *Walker Process knowingly* initiated litigation to enforce rights which were *clearly* invalid as a matter of law—clearly invalid because obtained by the earlier wrong of *knowing* fraud on the Patent Office. Try to apply the same test to a single certificated carrier faced with the problem of whether or not to enter, as a protestant, a certificate application proceeding initiated by another. Is it necessary for antitrust liability that the protestant's certificate be invalid and that he know it? Presumably plaintiffs would answer in the negative, yet the invalidity of the patent in *Walker Process* was central to the Court's holding. When is there "probable cause" that public convenience and necessity would or would not be served by further competition? Reference to defendants' discussion on Brief, pp. 30-41, and authorites there cited, should demonstrate that the question could almost never be answered with the clarity which was possible in *Walker Process,* because the *certification proceeding involves policy-making* by an agency *exercising legislative power and wide discretion.* The question should not even be *relevant* since the right to intervene in certification proceedings, unlike initiation of suit based on a cause of action for patent infringement, does not depend upon the existence of a substantive cause of action but arises from the agency's desire and need for such participation. See Petitioners' Brief pp. 41-46, and authorities there cited. The scheme of regulation would be frustrated if would-be protestants had first to weigh the likelihood of success in their protest against potential antitrust liability. Just as in *Noerr,* the exposure to anti-

trust liability for participation in regulatory proceedings would frustrate the legislative scheme and the proper functioning of the agencies involved. The same considerations just do not apply as in patent litigation, where as will be discussed further below, antitrust sanctions are virtually the *only* available regulation.

C. The resort to governmental agencies in certificate proceedings serves a different purpose than in patent litigation.

The restraint upon competition in the certification field involves factors wholly distinct from those in the patent field. The means involved in establishing a valid restraint is altogether different in each case, and the end to be served is likewise altogether different. Indeed, the differences are so great as to make the patent cases simply irrelevant.

Certificate proceedings before the ICC and PUC do not involve the same concept of "property" as in the patent cases. A certificate is merely a license to operate in certain ways in a given area, and the agencies are free to grant as many similar certificates as they deem fit under the statutory standard of "public convenience and necessity." See Petitioners' Brief herein, pp. 34-41. Moreover, a certificate may be transferred only if found to be not adverse to the public interest. Right of entry into the market, business practices, rates and many other facets of motor carrier operations are subject to rule and agency scrutiny. The function the agency exercises is a limited delegation of the legislative power involving broad discretion, and it is allowed by the standard of "public convenience and necessity" to consider all relevant factual, legal and economic considerations, including those rele-

vant to whether increased competition would benefit or harm the public interest. See Petitioners' Brief, pp. 41-44. That the proceedings in such cases are, for certain purposes, to be described as "adjudicative"[20] is no shibboleth on which to deny application of the *Noerr* rule, since it is clear that even litigation in the courts may involve the exercise of important political rights. *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963).[21] In their protests before the PUC and ICC defendants were exercising their right, provided for by statute and agency rule, to participate in adversary hearings on applications. Their participation is contemplated by those statutes and rules and is essential to the effective operation of the system of governmental regulation involved.

The patent cases involve completely different considerations. Patentees and the persons they may sue as infringers may be and usually are operating in industries otherwise unregulated in any manner comparable to that for certificated motor carriers. If the courts did not have

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[20]See the Court of Appeals opinion below, footnote 4, Jt.App. p. 50.

[21]See also *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* ..... U.S. ..... 28 L.Ed.2d 339 (1971). In this connection the significance of the arguments made on brief herein by *amici curiae* Landmarks Holding Corporation, et al. should not be missed. While defendants naturally contest the conclusions urged on this Court in that brief, they agree that the question whether the proceeding is adjudicative is an impossible standard: "The nature of the governmental body is not alone the decisive factor, which is perhaps just as well since there are many governmental bodies whose 'nature' on the representative-adjudicative continuum it would be difficult to state with confidence." Amici's Brief at 31. Amici in fact tactfully but clearly reject the Ninth Circuit's *ratio decidendi* and urge upon this Court a different, multi-factor test for applying the *Noerr* rule.

available the doctrinal tools of patent misuse and antitrust law to protect the public interest, the courts would have no discretion but to allow the actions to be brought and to award relief where infringement is shown, regardless of any broader policy considerations. When this fact is coupled with the peculiar tension between the patent laws and general antitrust policies, and with the fact that patent infringement is *the* major tool for protecting a patent monopoly, it becomes evident that the patent cases involve very special considerations, not present in this case, and should not govern the result here.

III. QUITE ASIDE FROM THE QUESTION WHETHER THE NOERR-PENNINGTON IMMUNITY APPLIES, CONGRESS AND THE CALIFORNIA LEGISLATURE HAVE EACH CREATED A SCHEME FOR OBTAINING RELEVANT INFORMATION RESPECTING PUBLIC CONVENIENCE AND NECESSITY WHICH ENCOURAGES EXISTING CARRIERS TO PROTEST TO WHATEVER EXTENT POSSIBLE AND WHICH SHOULD CARRY ANTITRUST IMMUNITY, ESPECIALLY SINCE ANY RESULTING RESTRICTION UPON COMPETITION IS NOT THE ACT OF PROTESTANTS BUT OF GOVERNMENT.

Plaintiffs argue that this Court intended to restrict the scope of *Noerr-Pennington* to joint approaches in the nature of lobbying, and that *Noerr-Pennington* does not provide immunity if the joint approach is in the medium of judicial or quasi-judicial procedures or if the governmental body in question is acting in an "adjudicatory capacity" within the framework of a legislative standard, however broad that standard might be.

While the defendants believe such argument legalistic rather than responsive to the reasons assigned by the

Court in *Noerr* for interpreting the Sherman Act as not extending to joint appeals to government, it is perhaps academic to dwell upon the issue whether *Noerr-Pennington* as such does or does not extend generally to joint appeals to administrative agencies and the courts on review. Defendants submit that where the regulatory scheme created by Congress and the California legislature respecting certificates of public convenience and necessity provides for and encourages the fullest intervention of competitors so that governmental officials may obtain evidence not otherwise conveniently available to assist them in the formulation of their decisions, it would be erroneous to find that Congress intended the Sherman Act to apply to such interventions. It would be erroneous since, as in *Noerr,* such activity is essentially dissimilar from the trade-restriction activity contemplated by Congress. It would be erroneous since, as in *Noerr,* there is a need for government to be informed, indeed a legislatively recognized need to be informed in the very way being challenged as a violation of the antitrust laws. It would be erroneous because the legislative scheme to encourage competitors to intervene would be defeated if competitors would have to fear antitrust liability if they did come forward to protest. It would be erroneous because of the resulting jeopardy to First Amendment rights.

In addition to the above reasons there is another compelling one, viz., that the *only* restriction upon competition resulting from defendants' protests is the act of *government,* not of defendants, and antitrust immunity applies under the teaching of *Parker v. Brown,* 317 U.S. 341 (1943).

To put this whole problem in proper perspective one must recognize that the only restriction which defendants by their alleged conduct can achieve on their own is a deterrence upon applicants, arising from the awareness of applicants that they cannot obtain a certificate without proving up and meeting whatever evidence defendants may present against the issuance of a new certificate. Such deterrence is simply part of the legal process. Whatever expense and effort is forced upon applicants to meet the fullest challenge on the merits mounted by the opposition is exactly what is contemplated by the regulatory process. In this special context there is nothing illegal or improper in joint financing and joint use of common counsel by the opposition. As noted by dissenting Judge Hamlin of the Court of Appeals, the PUC and ICC have ample power to protect their processes from abuse and can restrict protests to whatever extent they deem desirable.

In providing that opponents to an application for certification may come before the PUC or ICC, whether jointly or singly, both the state and federal schemes harness the self-interest of competitors to achieve the benefits of an adversary hearing on an application. The type of activity asserted by plaintiffs to be in violation of the antitrust laws is justified as a matter of public policy. Insofar as defendants combine to present the case against any application, they enrich the informational and intellectual resources available to the PUC and ICC. Moreover, without such concerted activity, an intelligent determination based on a balanced view of significant factors may be impossible to achieve in the

situation where there is no single certificated carrier with sufficient interest or financial willingness, by itself, to counterbalance the argumentative effort mounted by the applicant who obviously has a vital interest in the outcome of his application, an interest transcending in most cases that of any single carrier protesting. An individual protest is after all a minor role as opposed to the role of the affirmative seeking of certification.

The complaint admits that some certificate applications were denied *only* because of the intervention of defendants. Jt.App. 10. It follows that plaintiffs' argument is reduced to the following proposition: there is a right to seek certification free of protest from any group of truckers publicizing their intent to protest all applications, *even though* the effect is to sacrifice the practical availability to the Commission of information necessary to make an informed determination on the issue of public convenience and necessity. This is a sacrifice for which there is no reasonable justification. The Congressional and legislative intent is to encourage the flow of information from competitors so that sound decisions can be made.

The Court of Appeals majority identified as the anti-competitive effect of defendants' activities that "application by plaintiffs and other competitors for the issuance, transfer, or registration of operating rights were defeated, delayed or restricted . . .". Jt.App.p. 57. But unlike the "sham" exception noted in *Noerr*, such would be the result not because of any extra-governmental or fraudulent or other untoward conduct of defendants. It would be the result of applicant's inability to withstand

challenge in the adversary forum contemplated by the regulatory scheme for the determination of public convenience and necessity.

In the regulatory scheme which invites intervention by certificated protestants, the concept of "probable cause" simply has no place. In both adjudicative and legislative aspects the certification procedures of the ICC and PUC provide a hearing process expressly designed to separate meritorious claims from frivolous. Paradoxically perhaps, the determination of "public convenience and necessity" is best served by defendants' alleged activity in the very situation where plaintiffs suggest it is "sham" activity. When the application presents a strong prima facie case for granting a certificate, it is particularly important in the public interest that competitors come forward to provide opposition and investigation beyond the resources and inclination of the administrative body which might otherwise be prepared to rest upon superficial examination. Defendants submit that the Court of Appeals majority was in error in concluding that the complaint by the use of the term "with or without probable cause" introduces the possibility that the acts of protestants were "sham". Since plaintiffs have conceded that the efforts to persuade the governmental bodies were as effective as protestants could make them, there can be no "sham" in the *Noerr* sense.

CONCLUSION

This case is devoid of any anticompetitive effect which is not a usual and desirable aspect of the governmental regulation of motor carriers. This case involves principles of public policy wholly alien to the patent cases cited by plaintiffs. The activities determined by the Ninth Circuit majority to be in contravention of the antitrust laws serve the same governmental purposes recognized as valid in *Noerr* and *Pennington,* and do so through a regulatory framework designed to render successful such activities only insofar as they serve valid governmental purposes.

Since the First Amended Complaint, if construed to resolve all doubts in favor of plaintiffs, fails to state a cause of action under the federal antitrust laws, the decision of the Ninth Circuit should be reversed and the decision of the federal district court dismissing the complaint should be sustained.

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